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No. 09-549

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

BYRON SMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Carlson* v. *Green*, 446 U.S. 14 (1980), this Court held that an individual can normally maintain an Eighth Amendment claim for damages—under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)—against federal officials who inflict cruel and unusual punishment on him. The question presented here is whether such a claim is foreclosed in cases covered by the Inmate Accident Compensation Act, 18 U.S.C. § 4126.

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BRIEF IN OPPOSITION

STATEMENT

Petitioners' statement is correct in its essentials, but it does not adequately describe respondent Byron Smith's allegations in this case. Mr. Smith charges that he was repeatedly exposed to asbestos—and injured as a result—because of petitioners' deliberate indifference to a substantial risk of serious harm to him. *See* Second Am. Compl. (Dkt. No. 110), at 12-14 (Sept. 28, 2009); *see also Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994) (describing this as the relevant standard for Eighth Amendment liability).[1] More specifically, Mr. Smith

[1] All docket numbers cited herein pertain to case number 5:06-cv-3061-JTM-DWB (D. Kan.).

alleges that each individual petitioner knew that there was friable asbestos in a particular closet in the prison where he was housed, and that petitioners nonetheless sent him to perform work in the closet without first removing the asbestos, providing him with protective gear, or taking any other steps to address the serious health threat that the asbestos posed (and even without informing him of the threat). *See* Second Am. Compl. 14. During the administrative proceedings, the prison warden, petitioner Eddie Gallegos, acknowledged that a survey of the prison performed almost a decade before Mr. Smith's exposures documented the presence of the friable asbestos. *See id.* Ex. 10 (warden's statement); Opp. to Mot. To Dismiss (Dkt. No. 40), Ex. 2 (Feb. 1, 2007) (survey excerpts).

Mr. Smith states in the operative complaint that since his exposures he has experienced numerous ailments, including "recurring shortness of breath, chronic obstructive pulmonary disease, various lung infections, wheezing, bronchitis, ... [and] asthma, and [he] has recently been diagnosed with left lower lung linear atelectasis." Second Am. Compl. 12. Mr. Smith "did not suffer with any of these ... conditions prior to being exposed to asbestos." *Id.*

REASONS FOR DENYING THE PETITION

The court of appeals faithfully followed this Court's precedent in deciding this case. Petitioners do not contend that the Tenth Circuit's holding conflicts with a published decision from another circuit—it does not—and in fact petitioners do not argue that plenary review by this Court is warranted for any reason. They do assert that the Tenth Circuit's ruling is inconsistent with several of this Court's cases, but that assertion is meritless. Petitioners aiso ask that their petition be

held pending this Court's decision in *Hui* v. *Castaneda*, No. 08-1529 (cert. granted Sept. 30, 2009), but that request should be rejected because it is highly improbable that the decision in *Hui*, which revolves around an express preclusion clause unlike anything applicable here, will affect this case. The petition should be denied promptly.

1. The court of appeals correctly concluded that under this Court's case law, the Inmate Accident Compensation Act (IACA), 18 U.S.C. § 4126, does not foreclose respondent Byron Smith's Eighth Amendment claim against the individual petitioners. Adopting the extended analysis offered by the Seventh Circuit in *Bagola* v. *Kindt*, 131 F.3d 632 (7th Cir. 1997), the Tenth Circuit first observed that in *Carlson* v. *Green*, 446 U.S. 14 (1980), this Court held that an individual can normally pursue an Eighth Amendment claim, under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 488 (1971), against federal officials who inflict cruel and unusual punishment on him, *see* Pet. App. 16a (citing *Carlson*, 446 U.S. at 18). The Tenth Circuit recognized that this Court had earlier held, in *United States* v. *Demko*, 385 U.S. 149 (1966), that when the IACA applies it bars claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.* *See* Pet. App. 17a-18a (citing *Demko*). But the court of appeals correctly noted that *Demko* was not dispositive here because it addressed only the preclusion of FTCA claims (i.e., common-law tort claims), which serve a different purpose than *Bivens* claims (i.e., constitutional tort claims). *See id.*; *see also Bagola*, 131 F.3d at 642 & n.15; *Vaccaro* v. *Dobre*, 81 F.3d 854, 857 (9th Cir. 1996) ("*Demko* establishes that 18 U.S.C. § 4126 is the exclusive remedy 'against the Government.' [A] *Bivens* action is not against the government.

... Also, the theories as well as the defendants in section 4126 claims and in *Bivens* actions are different." (quoting *Demko*, 385 U.S. at 150)).

The court of appeals similarly took proper account of this Court's *Bivens* decisions since *Carlson*. The Tenth Circuit discussed every one of the cases with which petitioners contend its holding is inconsistent, including *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); and *Wilkie* v. *Robbins*, 551 U.S. 537 (2007). *See* Pet. App. 19a-20a & n.11; *see also Bagola*, 131 F.3d at 638, 640-641, 643-644 (discussing *Bush* and *Schweiker*). Indeed, the court quoted at length from *Bush* and *Schweiker* regarding when a *Bivens* remedy is precluded. *See* Pet. App. 19a-20a. The court then correctly explained why here those cases do not warrant a departure from this Court's approval in *Carlson* of an Eighth-Amendment-based *Bivens* remedy.

Specifically, the court explained (as the Seventh Circuit had in *Bagola*) that unlike in the cases in which this Court declined to permit *Bivens* claims, the alternative remedy here does little or nothing to deter unconstitutional conduct by federal officials: It offers no damages remedy, *see Carlson*, 446 U.S. at 21 ("It is almost axiomatic that the threat of damages has a deterrent effect[.]"), and it provides no forum in which unconstitutional conduct can be brought to light, thereby deterring such conduct. *See* Pet. App. 23a, 24a; *accord Bagola*, 131 F.3d at 644. Because this Court has "emphasized that 'the purpose of *Bivens* is to deter the officer,'" *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 69 (2001) (emphasis omitted) (quoting *Federal Deposit Ins. Corp.* v. *Meyer*, 510 U.S. 471, 485 (1994)), the court of appeals concluded that the lack of any deterrent effect renders the IACA an inadequate substitute

for a *Bivens* action. *See Wilkie*, 551 U.S. at 550 (courts addressing preclusion of a *Bivens* remedy first consider "whether any alternative, existing process for protecting the interest" is adequate to bar such a remedy).[2]

The court of appeals also embraced the Seventh Circuit's conclusion, *see Bagola*, 131 F.3d at 642-645, that no "special factors" foreclose a *Bivens* remedy in cases like this, *see Wilkie*, 551 U.S. at 550 (if no adequate alternative process exists, courts next consider whether any "'special factors counsel[] hesitation'" before recognizing a *Bivens* remedy (quoting *Bush*, 462 U.S. at 378)). That conclusion was likewise correct and consistent with this Court's case law, for two related reasons. *First*, this case does not involve any of the contexts that, under this Court's jurisprudence, sufficiently "counsel[] hesitation" as to foreclose a *Bivens* remedy, including: the military (*e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296 (1983)), government employment

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[2] Perhaps seeking to dispute the IACA's failure to provide a forum that can deter constitutional violations, petitioners note (Pet. 5) that IACA claimants can request a hearing on their claims. To begin with, however, the law's implementing regulations severely restrict claimants' ability to present (or challenge) evidence at such hearings. *See, e.g.*, 28 C.F.R. §§ 301.309(f), 301.310. More fundamentally, as the Seventh Circuit observed, "because § 4126 is a *no fault* compensation scheme, the conduct that caused the work-related injury is not relevant and likely will not be exposed by the claim evaluation process," including at any hearing. *Bagola*, 131 F.3d at 644. And because an IACA claim based on physical impairment cannot be made until shortly before an inmate's release, *see* Pet. 5 (citing 28 C.F.R. § 301.303(a)), any such hearing might not even occur until years after the injury, "when evidence likely will have been lost, offenders may no longer be federal employees, and other prisoners may have been subsequently subjected to similar unconstitutional abuses," *Bagola*, 131 F.3d at 644.

(*Bush*), federal fiscal policy (*United States* v. *Standard Oil Co. of California*, 332 U.S. 301 (1947)), and non-governmental or agency defendants (*Malesko*, *FDIC* v. *Meyer*). This case instead involves the same context that the Court in *Carlson* held does *not* involve any special factors precluding a *Bivens* remedy, namely the allegedly unconstitutional mistreatment of inmates by federal officials. *See* 446 U.S. at 19.

Second, the only special factor that petitioners pointed to in their briefing below was the possibility that permitting claims like Mr. Smith's "may deter [prison] employees from running work programs." Appellees' CA Supp. Br. 37. But as this Court has noted (in a case post-dating *Bush* and *Schweiker*), "[i]n *Carlson*, the Court held that 'special factors' do not free prison officials from *Bivens* liability, because prison officials ... are [not] likely to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim." *McCarthy* v. *Madigan*, 503 U.S. 140, 151 (1992) (citing *Carlson*, 446 U.S. at 19). Petitioners offered nothing below (and offer nothing in the petition) that would support a different conclusion in cases covered by the IACA. In particular, they offer nothing indicating that prison officials in the Seventh and Ninth Circuits have been deterred from running work programs, even though for more than ten years it has been the law in both circuits that the IACA does not bar *Bivens* claims, *see Bagola*, 131 F.3d 632; *Vaccaro*, 81 F.3d 854.

In sum, the decision below was faithful to all of this Court's case law. It was also consistent with the IACA's implementing regulations, which provide that the statute precludes only common-law tort claims. *See* 28 C.F.R. § 301.319 ("Inmates who are subject to the provisions of these Inmate Accident Compensation regulations are barred from recovery under the

Federal Tort Claims Act, 28 U.S.C. [§§] 2671 *et seq.*"). Deference to the statutory interpretation reflected in these regulations supports the Tenth Circuit's view that Mr. Smith's Eighth Amendment claim is not foreclosed. *Cf. Howe* v. *Smith*, 452 U.S. 473, 485 (1981) ("Because the Attorney General, and through him the Bureau of Prisons, are charged with the administration of [18 U.S.C.] § 5003, their view of the meaning of the statute is entitled to considerable deference."). *See generally Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984).

Finally, the Tenth Circuit's ruling is almost certainly in line with Congress's intent regarding the IACA's preclusive effect—which is of course what ultimately controls. It has been over a decade since the Seventh and Ninth Circuits reached the same conclusion about the IACA's impact on *Bivens* actions that the court of appeals did here. *See Bagola*, 131 F.3d 632; *Vaccaro*, 81 F.3d 854. Yet Congress has not acted to overturn those courts' rulings. As this Court has explained, such congressional inaction in the wake of a judicial construction of a statute strongly suggests that the construction is correct. *See Shepard* v. *United States*, 544 U.S. 13, 23 (2005) ("[T]ime has enhanced even the usual precedential force [applicable in cases of statutory interpretation], nearly 15 years having passed since *Taylor* [v. *United States*, 495 U.S. 575 (1990),] came down, without any action by Congress to modify the statute."); *United States* v. *Johnson*, 481 U.S. 681, 686 (1987) ("Nor has Congress changed this standard in the close to 40 years since it was articulated [by the Court], even though ... Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." (quoting *Feres* v. *United States*, 340 U.S. 135, 138 (1950))).

That *Bagola* and *Vaccaro* were decided by courts of appeals rather than this Court does not alter this conclusion, because Congress sometimes reacts to the decision of even a single court of appeals. *See, e.g.*, *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 282 n.19 (1977) ("Acting to reverse a Circuit Court of Appeals decision, Congress authorized issuance of licenses for the 'coasting trade and mackerel fishery.'" (citation omitted)); *Owner-Operator Indep. Drivers Ass'n* v. *Federal Motor Carrier Safety Admin.* (FMCSA), 494 F.3d 188, 197 (D.C. Cir. 2007) ("After our [prior] decision ... vacated the 2003 Rule, FMCSA sought and received temporary relief from the vacatur in Congress."). Here, there were two published circuit decisions that applied to roughly a score of federal prisons (likely employing hundreds or thousands of potential *Bivens* defendants). *See* List of U.S. Federal Prisons, *at* en.wikipedia.org/wiki/List_of_U.S._federal_prisons (last visited Dec. 17, 2009); Bureau of Prisons: Maps of Facilities, *at* www.bop.gov/locations/locationmap.jsp (last visited Dec. 17, 2009). Under these circumstances, Congress's prolonged inaction is highly instructive, and it confirms the correctness of the decision below.

2. Petitioners nevertheless challenge the Tenth Circuit's IACA holding. Petitioners do not assert, however, that it conflicts with an authoritative decision from any other circuit. To the contrary, they rightly acknowledge that each of the other two circuits to address the question presented in a published opinion—the Seventh and the Ninth—reached the same conclusion that the court of appeals reached here (as did another circuit in an unpublished opinion). *See* Pet. 12 n.6 (citing *Bagola*, *Vaccaro*, and *Cooleen* v. *Lamanna*, 248 F. App'x 357, 362 n.5 (3d Cir. 2007)). Petitioners instead contend that the Tenth Circuit's decision and rea-

soning are inconsistent with *Demko*, *Bush*, *Schweiker*, and *Wilkie*. That contention is without merit.

To begin with, petitioners concede (Pet. 13) that *Demko* "does not strictly control the outcome of this case" because it involved preclusion of common-law (i.e., FTCA) claims against the United States, rather than constitutional (i.e., *Bivens*) claims against federal officials. In fact, this Court made the limit of its holding in *Demko* quite clear, stating that "[u]ntil Congress decides differently we accept the prison compensation law as an adequate substitute for a system of recovery *by common-law torts*." 385 U.S. at 153 (emphasis added); *see also, e.g., id.* at 151 ("[C]ompensation laws are practically always thought of as substitutes for ... common-law tort actions."). Petitioners argue, however (Pet. 13), that the reasons underlying the Court's decision in *Demko* should have led the court of appeals to conclude that the IACA bars a *Bivens* remedy. But those reasons do not apply equally to preclusion of *Bivens* actions, because FTCA and *Bivens* claims serve different purposes. The purpose of FTCA claims is to ensure compensation for injured plaintiffs. *See, e.g., Johnson*, 481 U.S. at 689-690. By contrast, "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations," *Malesko*, 534 U.S. at 70. Hence, while the fact that Congress "'created a comprehensive system *to award payments for injuries*,'" Pet. 13 (emphasis added) (quoting *Demko*, 385 U.S. at 151), does suggest an intent to bar FTCA claims, which serve the same purpose, it does not suggest an intent to foreclose *Bivens* claims, which serve a very different purpose.

Petitioners next assert (Pet. 13) that the Tenth Circuit "placed undue reliance" on this Court's statement in *Carlson* that Congress can bar a *Bivens* rem-

edy by expressly declaring an alternative remedy to be an equally effective substitute. The court of appeals did no such thing. To be sure, on the pages petitioners cite the court properly recounted this Court's holding in *Carlson*. *See* Pet. App. 18a-19a. But that hardly constitutes "undue reliance" on that holding. And as explained, *see supra* pages 4-5, the Tenth Circuit went on to recount (and apply) this Court's later *Bivens* decisions, including those to which petitioners point. *See* Pet. App. 19a-24a. In doing so, the court noted that the IACA does not explicitly foreclose a *Bivens* action, *see id.* at 23a—and that observation was proper, because an express congressional declaration, while not necessary to preclude a *Bivens* remedy, is certainly one way in which congressional intent to bar *Bivens* actions *can* be revealed. *See Bush*, 462 U.S. at 378 ("When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, ... that the courts' power [to recognize a *Bivens* remedy] should not be exercised."); *see also id.* at 373, 378 (noting the absence in that case of any express preclusion). Nowhere, however, did the court of appeals say or even imply, as petitioners suggest, that it was rejecting petitioners' position solely because such express preclusion was absent. Nor did the court in *Bagola*, which the Tenth Circuit followed here, say or imply anything of the sort. To the contrary, the Seventh Circuit stated that it could not "consider *Carlson*'s dictates alone in deciding whether Bagola can properly state a *Bivens* claim," because "[t]he Supreme Court subsequently has refined this [preclusion] inquiry." 131 F.3d at 639 (citing *Schweiker*, 487 U.S. at 423). And *Bagola* then went on to discuss and apply the cases that made those refinements. Put simply, nothing in the decision below supports petitioners' claim that the court of appeals

"placed undue reliance" (Pet. 13) on the "explicitly declared" and "equally effective" language in *Carlson*.[3]

Petitioners likewise go astray in asserting (Pet. 15) that the Tenth Circuit "stressed that the remedies provided in the IACA do not provide full relief for plaintiffs' alleged constitutional injuries." Petitioners provide no concomitant cite to the Tenth Circuit's opinion in making this charge, and in actuality the court of appeals did not mention this fact, let alone "stress[]" it. The closest the court came was its statement that an IACA claim "would be a far different, less inclusive system of recovery than the *Bivens* action." Pet. App. 23a. But as its use of the word "system" makes clear, the court was referring to the fact that under the IACA, relief is afforded through an administrative rather than a judicial process, one that does not provide the same procedural protections (full discovery, for example), nor permits recovery against those who caused the harm. In any event, here again petitioners' argument suggests that the court of appeals placed dispositive weight on this factor. That is manifestly wrong. At most the court regarded the minimal relief available under the IACA as one factor—which the court properly considered along with many others—that is relevant in ascertaining Congress's intent. *See Schweiker*, 487 U.S. at 425 (pertinent consideration for courts is

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[3] Even were it otherwise, that would not establish a clear conflict between the Tenth Circuit's decision and *Bush* or *Schweiker*, as petitioners suggest: In *McCarthy*, which post-dated *Bush* and *Schweiker*, this Court reiterated and applied *Carlson*'s "equally effective" and "explicitly declared" standard. *See* 503 U.S. at 151 (citing *Carlson*, 446 U.S. at 18-19). *McCarthy*, moreover, unlike any of the Court's other post-*Carlson Bivens* cases, involved the same Eighth Amendment claim at issue here (and in *Carlson*).

whether Congress has "failed to provide meaningful ... remedies"); *accord Bush*, 462 U.S. at 368, 386.

As for *Wilkie*, petitioners never directly explain the supposed inconsistency between that decision and the Tenth Circuit's ruling. In their Statement, however, they assert (Pet. 10) that the court of appeals "rejected petitioners' argument that the court should ... us[e] the analysis ... in *Wilkie*" and "adopted instead the pre-*Wilkie Bagola* court's analysis of 'special factors.'" The premise of this assertion—left implicit here but stated explicitly in petitioners' briefing below—is that *Wilkie* changed the framework for analyzing the preclusion of *Bivens* actions, such that the "pre-*Wilkie Bagola* court's analysis of special factors" is no longer appropriate. That premise is false. *Wilkie* employed the same basic analysis that this Court has used for decades, explaining that a *Bivens* action may be foreclosed when Congress provides adequate alternate remedial mechanisms for constitutional violations or when there are "special factors" suggesting that a *Bivens* remedy is inappropriate. *See Wilkie*, 551 U.S. at 550; *compare Bush*, 462 U.S. at 378; *Carlson*, 446 U.S. at 18-19 & n.5. *Wilkie* introduced the labels "step one" and "step two," but it did not substantively change the doctrinal framework. *Wilkie* itself makes this clear, both by stating that its "consideration of a *Bivens* request follows a familiar sequence," 551 U.S. at 550, and by citing *Bush* in describing both step one and step two, *see id.* *Bagola*'s analysis, and hence that of the Tenth Circuit, was thus fully consistent with *Wilkie*.[4]

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[4] Petitioners also note the Tenth Circuit's statement "that no analysis of whether to recognize a new *Bivens* remedy was necessary because this Court in *Carlson* had already recognized a

In short, there is no merit to petitioners' claim that the Tenth Circuit's decision is inconsistent with any of this Court's holdings or reasoning. The Seventh Circuit's analysis in *Bagola*—repeated in part and adopted in full by the Tenth Circuit here—involved both an extended discussion of this Court's relevant decisions and a careful application of those decisions to the question presented here. Further review is unwarranted.

3. Petitioners themselves appear to recognize this, as they do not ask this Court to undertake plenary review. They instead ask the Court to hold their petition pending the decision in *Hui* v. *Castaneda*, No. 08-1529. According to petitioners (Pet. 15-16), the decision in *Hui* "will likely illuminate the circumstances in which an existing statutory remedy precludes recognition of a *Bivens* remedy when Congress has not explicitly stated its preclusive intent." That is incorrect, and hence a hold is not warranted.

As petitioners state (Pet. 11), *Hui* presents the question whether 42 U.S.C. § 233(a) bars certain *Bivens* claims against members of the Public Health Service (PHS). But of central importance in *Hui* is the fact that § 233(a) expressly provides that an FTCA action for injuries resulting from specified conduct by a PHS offi-

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Bivens remedy for 'an Eighth Amendment violation by prison officials.'" Pet. 10 (quoting Pet. App. 20a n.11). That statement was entirely correct; the Court in *Carlson* did recognize the precise *Bivens* remedy that Mr. Smith seeks to invoke. *See, e.g., Wilkie*, 551 U.S. at 549-550 ("[W]e have recognized [a *Bivens* remedy] ... for an Eighth Amendment violation by prison officials." (citing *Carlson*)). But of course that fact did not relieve the court of appeals of its obligation to analyze whether, under *Carlson* and later decisions, the IACA bars the remedy that this Court has held is normally available. The Tenth Circuit fulfilled that obligation.

cer or employee "shall be exclusive of any other civil action or proceeding" based on the same injuries. The IACA contains no remotely similar clause—or, indeed, any preclusion clause.[5] There is thus no merit to petitioners' vague assertion that "[t]his Court's disposition of [*Hui*] will likely illuminate the circumstances in which an existing statutory remedy precludes recognition of a *Bivens* remedy *when Congress has not explicitly stated its preclusive intent.*" Pet. 15-16 (emphasis added); *accord* Pet. 12. In reality, the Court's decision and reasoning in *Hui* will almost certainly be grounded entirely in the express preclusion clause in § 233(a).

This is confirmed by the fact that the text, purpose, and history of that clause are (not surprisingly) the overwhelming focus of the merits briefs filed in this Court in *Hui* both by the petitioners and by the United States as amicus curiae.[6] In fact, the United States argues in its brief that "[t]he plain language of Section 233(a) resolves this case." U.S. Amicus Br. 7, *Hui* v. *Castaneda*, No. 08-1529 (U.S. Dec. 11, 2009), *available at* 2009 WL 4759119. Even if that argument is correct, it is irrelevant to the Tenth Circuit's decision here, as

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[5] This also distinguishes the IACA from the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101 *et seq.*, which likewise contains an express preclusion clause, *see id.* § 8116(c); *see also* Pet. 3 (attempting to link the IACA and FECA).

[6] For example, the first (and longest) argument section in one petitioner's brief is entitled "The Plain Language of § 233(a) Bars Respondents' *Bivens* Claims Against Petitioners." Br. for Pet. Gonsalves 23-42, *Hui* v. *Castaneda*, No. 08-1529 (U.S. Dec. 4, 2009), *available at* 2009 WL 4617134; *see also* Br. for Pet. Hui 19-33, *Hui* (Dec. 4, 2009), *available at* 2009 WL 4709537 (similar); U.S. Amicus Br. 9-19, *Hui* (Dec. 11, 2009), *available at* 2009 WL 4759119 (plain-text and legislative-history arguments).

are virtually all of the other arguments that the petitioners and the United States advance in *Hui* for reversal of the Ninth Circuit's ruling. Contrary to petitioners' unelaborated contention here, then, *Hui* is extremely *un*likely to have any application to cases—such as this one—that involve no express preclusion clause. Even if the Court in *Hui* were to speak to cases like this one, moreover, there is no reason to expect that it would do so in a way that departs from prior *Bivens* case law. Again, neither the United States nor the petitioners in *Hui* propose such a departure. And as discussed, the court of appeals here properly considered that prior case law. There is thus no "reasonable probability" that a remand to the Tenth Circuit following the decision in *Hui* would lead to a different result. *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). A hold is therefore not warranted.[7]

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[7] The United States itself has argued against a hold in similar circumstances. In its brief in opposition in *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008), the United States contended that there was no need to hold the petition for certiorari pending the decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007). The government acknowledged that the two cases presented similar issues "[a]t a general level." U.S. Br. in Opp. 15, *John R. Sand & Gravel Co.* v. *United States*, No. 06-1164 (U.S. Apr. 27, 2007), *available at* 2007 WL 1257289. "But," the United States asserted, "because *Bowles* does not involve a statutory provision governing the time for filing suit against the United States, the Court should have no occasion to address the question presented here[.]" *Id.* The same logic applies here: Both *Hui* and this case involve a similar issue "[a]t a general level," *id.*, namely whether an otherwise-available *Bivens* remedy is precluded by a particular statute. But because *Hui* involves—and indeed revolves around—an express preclusion clause unlike anything in the IACA, the Court's decision in *Hui* will very likely have little or no bearing here.

Furthermore, an unnecessary hold would cause prejudice to Mr. Smith, because proceedings in the district court have effectively been stayed—at petitioners' behest—pending the Court's disposition of the petition. Following the Tenth Circuit's remand, Mr. Smith filed a second amended complaint. *See* Dkt. No. 110. Rather than answer, petitioners moved to stay the proceedings in light of the filing of their petition for certiorari. *See* Defs.' Mot. To Stay Proceedings & Notice of Pet. for Writ of Cert. (Dkt. No. 115) (Nov. 6, 2009). The district court has not acted on the motion, even though it was filed over a month ago, and the deadline for petitioners to answer the complaint likewise passed well more than a month ago. In effect, then, proceedings have been stayed, thereby delaying the time when Mr. Smith may finally receive relief for the constitutional violations he alleges. Given the extreme unlikelihood that the decision in *Hui* will affect this case, the Court should not impose an additional delay of several months on Mr. Smith by holding the petition until it decides *Hui*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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